89-1946

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

RALPH ROGER BERGMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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(a)

QUESTIONS PRESENTED:

(1) Can Respondent now prevail before the U.S. Supreme Court, having previously obstructed justice on nine counts in this case before the Supreme Court of the United States in BERGMAN V UNITED STATES, S.Ct.Case #85-44?

(2) Can the Tenth Circuit Appeals Court opinion be sustained in light of the fact that it does not address the F.R.P.60 (B)(6) motion of Petitioner relating to a 5 U.S.C. #552a, a Statute of Limitation issue in Colo.D.Ct. case #82-A-1665 and the actions of Judge Alfred A. Arraj, but instead addresses the substance of a 28 U.S.C. #2680 tort case in COLO.D.Ct.#83-A-188, which Petitioner did not appeal?

(3) Can a 2 year statute of limitation for correction of substantially erroneous Federal employment classifications and competitive levels expire under 1976 Privacy Act Law 5 U.S.C. #552a, with Respondent relying on his success in obstructing justice under sovereign immunity through sixteen years of cumulative bad faith litigation:

(3a) before the former U.S.Civil Service Commission appeals authorities using fraudulent records and pleadings in bad faith under assumption of truth;

(3b) before U.S.Court below using perjury, fraud sophistry and deceit under self-invoked sovereign immunity;

(3c) before the Supreme Court of the United States;

(3d) when there is no dispute, as the proper classifications and competitive levels were trial-assigned in the Court of Claims in 1981 by a Federal classification expert without a single objection by Respondent.

(4) Can a 2 year statute of limitation for correction of erroneous Federal employment classifications and competitive levels under 5 U.S.C. #552a have expired:

QUESTIONS PRESENTED – Continued:

(4a) based on Respondent's claim that the cause of action under 5 U.S.C. #552a arose in 1968, eight years prior to creation of this law;

(4b) with Petitioner having filed appropriate administrative appeals in a timely manner and with respondent violating 5 U.S.C. #552a by failing to inform Petitioner of his right to file a complaint in the appropriate U.S.district court so mandated by the Privacy Act;

(4c) with the first adverse action based on erroneous classifications and competitive levels after a 1976 CSC audit and rewrite of Petitioner's duty statements occurring on June 16th, 1982?

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RALPH ROGER BERGMAN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Ralph Bergman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 16th, 1990.

OPINIONS BELOW

The Order of the Court of Appeals for the Tenth Circuit was entered on January 16, 1990, and appears in Appendix A.

JURISDICTION

—A Petition for Rehearing or Hearing En Banc was denied on February 28, 1990, see Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. #1254(1).

The Honorable Justice Byron White, on May 16, 1990, extended Petitioner's time to file this brief until June 28, 1990.

STATUTORY PROVISIONS INVOLVED

§552a RECORDS MAINTAINED ON INDIVIDUALS

* * *

(d) Access to records

Each agency that maintains a system of records shall –

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and –

(A) not later than 10 days (excluding Saturday's, Sunday's, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either –

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturday's, Sunday's, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

* * *

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall –

* * *

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

* * *

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in

accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

* * *

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * *

STATEMENT OF THE CASE

INTRODUCTION.

Pro-Se Petitioner begs for the Supreme Court's compassion not to reject this petition because it is not perfect. He was bankrupted by Respondent, lost his home and lands, was hounded into disability retirement and has no funds for counsel. He had a recent heart attack and triple bypass surgery and is limited in his efforts here. Judge Alfred A. Arraj in the U.S. District Court for Colorado, granted Petitioner informa pauparis standing before the 10th Circuit on June 6, 1989 and stated that Petitioner's case is not frivolous and presents a substantial question, App. C.

CASE PREJUDICED AGAINST PETITIONER ON ITS FILING.

Petitioner fears that the merits of this certiorari request may not reach the eyes of the Honorable Justices because Solicitor General Dr. Charles Fried would not want to admit to the Justices how he misled the Supreme Court previously under S.Ct.case #85-44 in October 1985. His obstruction of justice is addressed in detail below. Dr. Fried said on CBS "Face The Nation", June 25, 1990, that he advises the Supreme Court which case to consider and which to reject, so Dr. Fried is expected to recommend denial, as he did in *Bergman v U.S.*, S.Ct # 85-44 and #88-1519.[1]

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[1] Bergman's S.Ct. #88-1519 was to reverse a Fed.R.Civ.P. 60(b)(6) motion to the Court of Appeals for the Federal Circuit to vacate the void 1982 Court of Claims opinion #84-78 in *Bergman v U.S.* were Federal officials obstructed justice under sovereign immunity, *Bergman v U.S.* 751 F.2d 314 (1984). Petitioner claimed negligence, but the Court agreed with Respondent and held for intentional tort, see App.D. Petitioner also claimed negligence against Dr. Fried in COLO. D.Ct. #87-F-1341 which was dismissed on a claim of "procedural error" and Dr. Fried's sovereign immunity.

CASE HISTORY.

Petitioner filed two unrelated cases in the U.S. District Court in Colorado, case #82-A-1665 under 5 U.S.C. #552a to add corrected and uncontested classifications and competitive levels to CSC rewritten duty statements of November 5th, 1976, Appendix G, and tort case #83-A-188, which charged negligence in the 1978-1982 Court of Claims litigation. Respondent denied administrative appeals for classification relief in 1976, 1977 and 1978, Appendix H and I., and only after Petitioner received an adverse decision by the U.S. Court of Claims in June 1982, based on his erroneous employment record, was there jurisdiction to file in the District Court under 5 U.S.C. #552a(g)(1)(C).[2]

Respondent failed to observe 5 U.S.C. #552a(d)(3) to " . . . notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) and consequently Petitioner initially had no knowledge of 5 U.S.C. #552a. But 5 U.S.C. #552a(g)(1)D allows an individual to sue when an agency " . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse

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[2] Someone made the fatal error of combining these two cases in *Bergman v United States*, 751 F.2d 314 (Tenth Cir. 1984) and "opened the door" to untold confusion. With this, the Courts don't know which case is appealed without reading the appeal and Respondent takes full advantage of that fact to confuse and obfuscate.

effect on [the] individual." After the November 5th, 1976, CSC audit and duty statement rewrite, June 16th 1982 was the first adverse effect on Petitioner, resulting from the false competitive levels and false classification Respondent maintained in Petitioner's official personnel folder (OPF).

Respondent misled the courts in COLO. D.Ct. #82-A-1665 to "find" that a 2 year statute mandated by 5 U.S.C. #552a, had tolled by 1982 and won dismissal. Dr. Charles Fried supported this in his opposition to S.Ct. #85-44, pleading erroneously that Petitioner's cause of action under 5 U.S.C. #552a arose in 1968, eight years before Privacy Act 5 U.S.C. #552a was created. For a statute to toll before it existed is not logical or rational, especially since 5 U.S.C. #552a(g)(5) does not authorize any action by reason of injury before September 27, 1975.

Although unaware of 5 U.S.C. #552a in 1976, Petitioner met Privacy Act appeal requirements in appealing to the CSC in 1976, App. H, and to the DOC, App. I, which were denied by Respondents without informing him of the right to file in District Court, mandated in 5 U.S.C. #552(a)(d)(3). Yet, Dr. Fried misled the Supreme Court in S.Ct. case #85-44 by erroneously claiming that Petitioner never filed an administrative appeal.

In 1981, DOC personnel officer Mr. Edgar A. Hubin submitted Petitioner's erroneous classifications and competitive levels into evidence in the Court of Claims where Petitioner sued to reverse an illegal 1973 reduction-to-force (RIF). Mr. Hubin then misled that court into finding for respondent with a perjured affidavit for which Hubin received sovereign immunity by the 10th Circuit in *Bergman v U.S.*, 751 F.2d 314 (Tenth Cir. 1984), based on the Court's opinion that the Tort was intentional.

During the 1981 Court of Claims trial for improper RIF, case #84-78, a Federal classification expert assigned correct classifications and competitive levels to the 1976 CSC rewritten duty statements without objection of Respondent, but the Court of Claims found for Respondent, relying on the erroneous classifications and competitive levels, the perjured testimony and Respondent's fraud. This verdict was the first adverse decision against Petitioner based on false classifications and competitive levels since the November 5th, 1976 CSC duty statement rewrite and since 5 U.S.C. #552a was created.

Petitioner filed immediately under 5 U.S.C. #552a in case COLO. D.Ct. #82-A-1665 but Respondent convinced the Court that the statute has tolled. In October 1985, on Petitioner's motion for certiorari in COLO. D.Ct. case #82-A-1665, Dr. Charles Fried misled the Supreme Court of the United States in S.Ct. case #85-44 by pleading a minimum of nine prima facie falsities addressed below. The Supreme Court believed Dr. Fried and denied certiorari.

CASE BACKGROUND 1962 to 1975.

Petitioner was employed by Respondent in Boulder, Colorado, between 1962 and 1977 except for three years due to illegal RIFs in 1968 and 1973. Respondent obstructed justice before Civil Service Appeals Authorities, claiming falsely under "assumption of truth", that Petitioner was not entitled to "bump" lower competitive engineering levels because "Petitioner was a low support illiterate who had no engineering education, training or experience".[3] To ensure in 1973 that Petitioner would be unable to pin-point a lower position for which he had legal displacement rights, Respondent withheld the competing employee records mandated by 5 C.F.R. #351. Instead, he confused the Courts with incomplete and false records and a perjured affidavit under "assumption of truth".

When re-employed in 1968, Petitioner again tried to gain correct employment records but was threatened to stop or be terminated again. In June, 1973, Petitioner filed formal grievances to correct his then current duty statement and competitive level along with other correction requests. Respondent served a RIF notice and terminated Petitioner on August 31st, 1973, as threatened.[4]

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[3] "Petitioner holds a degree in physics from the University of Colorado, 1962, and is a registered professional engineer in Colorado #8711 since 1968."

[4] A 1974 CSC audit of Respondent's employee relations practices in Boulder Colorado (Ct.Cl.Ex. #109-13) states in pertinent part: " . . . Many RSS employees interviewed indicated a reluctance to "make waves" for fear of some kind of reprisal. For example, three employees reported being told by supervisors that they would be "out of a job" if they requested a position audit. Other employees reported that supervisors

(Continued on following page)

Petitioner's written official grievance of June 1973, demanding a position audit to gain a true duty statement with proper classification never came to a hearing. The "examiner", a Mr. Douglass Wade, denied Petitioner to address erroneous duty statements and competitive levels at the January 1974 "hearing", held three months after Petitioner was separated. In April of 1974 Wade wrote that he "found nothing detrimental to Petitioner in his OPF", but permitted Petitioner to place four pages of comments regarding his engineering work into his OPF. These comments were discredited by D.O.C. personnel officer Edgar A. Hubin in an illegal letter to Petitioner's OPF, Ct.Cl.Ex. #145, App. E.

While unemployed in June 1975, Petitioner appealed his right to a GS-5 part time Physicist vacancy under priority re-employment rights and was re-hired. On July 15th, 1975, Petitioner filed a formal classification appeal as the work consisted of engineering duties on a much higher level. The appeal, Ct.Cl.Ex. #306 is shown in App. F it was ignored.

Dr. Charles Fried misled the Supreme Court in S.Ct. #85-44, pleading untruthfully that Petitioner never filed a classification appeal while working for Respondent, App. E and App. F.

The CSC ordered Petitioner rehired to a part time GS-7 engineering position in July 1975, but Respondent denied him work for 6 months, forced him to sit at an empty desk without work eight hours a day, five days a week for six months and then harassed him with sham tasks to make him sick. D.O.C. documents discovered in 1981 show Respondent planning to circumvent the CSC reinstatement order by offering Petitioner a sham position scheduled for abolishment. In Ct.Cl.Ex.#84, D.O.C. Policy Chief Joseph C. Brown states on July 22, 1975 in pertinent part: " . . . If ITS has to create a job to accomplish this action, do so, explaining to Bergman what is being done and telling him it's a "paper job" which will

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(Continued from previous page)

made statements such as, "Grievances are not appreciated around here."; "Keep your mouth shut, you have no right of appeal." and "Don't make waves or you will regret it." The DOC personnel officer in charge of that department was Mr. Edgar A. Hubin.

immediately be abolished as no longer required with a new RIF being run however it runs."

CASE BACKGROUND AFTER SEPTEMBER 27TH, 1975.

After a position on description audit on November 5th, 1976, the CSC stated that all of Petitioner's duty statements from 1962 to 1973 failed to satisfy CSC accuracy requirements and addressed respondent's duty statement practices, App. G. The CSC rewrote all of Petitioner duty statements and ordered them into his OPF. Petitioner's demand for proper classification of these new duty statements was denied by the CSC and by Respondent, see App. H and I. To date, Petitioner's OPF contains the corrected duty statements, but under false classifications and competitive levels held over from the former inaccurate duty statements assigned between 1962 and 1973.[5]

FORMAL APPEALS FOR ASSIGNMENT OF TRUE COMPETITIVE LEVELS.

On November 12th, 1976, Petitioner appealed to the CSC to classify the new duty statements, seven days after CSC had published its audit report on November 5th, 1976, App. G. He was not aware of 5 U.S.C. #552a and so could not cite the law. On December 17th, 1976, Petitioner's appeal was denied, App. H. Respondent withheld information about Petitioner's right to file an action for review in the local district court, mandated by the Privacy Act.

In 1977, Petitioner appealed to President Carter who ordered a D.O.C. Secretarial Audit. The Honorable Asst. Sec. of Comm. Mrs. Elsa Porter admitted in her 1977 audit report that (1) Petitioner was misclassified and (2) that DOC officers

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[5] September 27th 1975 is significant because 5 U.S.C. #552a(g)(1)(B)(5) states: " . . . Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as a result of a disclosure of a record prior to September 27, 1975". Dr. Fried pleaded to the Supreme Court, S.Ct. case #85-44, that 1968 was an appropriate date of accrual for Petitioner's cause of action under the 1976 5 U.S.C. #552a law, which is nonsense.

misled the CSC appeals authorities in Petitioner's RIF appeals but did not institute corrections and failed to inform Petitioner of his right to file an action under 5 U.S.C. #552a, App. I.

In a letter discovered in 1981 under Freedom of Information Act procedures, Secretary Porter was advised not to institute corrections by D.O.C. Policy Chief Joseph C. Brown. This 2/22/78 letter is Ct.Cl.Ex.#305 with pertinent part shown in App. J. Mr. Brown deceived the Secretary with this letter. He claimed that many employees were affected in the "same RIF". This is untrue. On August 31st, 1973, Petitioner was the only employee affected out of thousands of D.O.C. employees in Colorado. A prior letter from Mr. Joseph C. Brown to Secretary Porter of January 18, 1978 Ct.Cl.Ex. #300, also discovered in 1981 is shown in App. K. It states in pertinent part: " . . . Current contentions, not new, but now supported by evidence Bergman did not have before:

1) Previously-held positions mis-classified; clearer evidence now available tends to support this long-held contention. Agency generally concedes but cannot now rectify or "make-whole".

2) Certain agency officials misled FEAA and/or ARB by making submissions in the 1973 RIF appeal which suppressed information favorable to Bergman's appeal (i.e., information about his actual work assignments tending to show his position was misclassified and his engineering qualifications were stronger in professional engineering than his official employment record shows.)", App. K.

In 1978, Petitioner filed in the U.S. Court of Claims for 1973 RIF cancellation. A Court pre-trial order required Petitioner to show whether he would have had displacement rights above GS-7 based on the new 1976 CSC duty statements. A Federal classification expert testified for Petitioner unopposed and trial-classified all new 1976 CSC audit rewritten duty statements which certified Petitioner working as GS-14 electronics engineer when RIF'ed in 1973 and as GS-12 electronics engineer when RIF'ed in 1968. THESE CLASSIFICATIONS AND COMPETITIVE LEVEL ASSIGNMENTS are the ones that Petitioner wants incorported in his official

personnel folder because respondent has not challenged their accuracy.

The 1982 Court of Claims opinion ignored the expert classification testimony, stating that the testimony was "suspect" because "the expert was not an electronic engineer". Instead, the Court relied on the tort-contaminated 1975 CSC findings (App. K), on Respondent's perjured testimony, fraud, deceit, sophistry, and on Respondent's false classifications and competitive levels prepared between 1962 and 1973 by officials who also were not electronic engineers.

THE BAD FAITH LITIGATION BEFORE THE SUPREME COURT BY ACTING SOLICITOR GENERAL DR. CHARLES FRIED ESQ.

This record correction case first reached the Supreme Court on a motion for certiorari under *Bergman v. U.S.*, S.Ct.case #85-44. Acting Solicitor General Dr. Charles Fried Esq. misled the Supreme Court with nine pleadings of factual untruths to win certiorari denial.

Petitioner was unaware of these pleadings as his counsel withheld copy of Dr. Fried's submission Counsel failed to comprehend the case and failed to utilize Petitioner's right of reply.

UNTRUTH PLEADED (1)

Page 2 of Dr. Fried's opposition brief, S.Ct. case #85-44 states: " . . . In particular, the Court of Claims noted that petitioner had never, while employed by the Department, undertaken a formal classification appeal under available procedures (slip.op.27) and that, in any event, petitioner had suffered no prejudice as a result of the challenged position descriptions (id.at 29.(3).

TRUTH EXPOSED (1)

One formal classification appeal was filed July 15th 1975, Ct.Cl.Ex.#306, Appendix F. The other formal appeal, dated June 1973 for correction of an encumbered position, was suppressed and then obfuscated by Respondent, see Cl.Ct.Ex.#145, App. E.

UNTRUTH PLEADED (2)

To support the argument that erroneous duty statements did not prejudice Petitioner, Dr. Fried pleaded on pages 2 and 3, his footnote (3): " . . . the court's conclusion was based on the fact that the Civil Service Commission had earlier reviewed petitioner's position descriptions, found them insufficiently detailed in certain respects, and ordered them corrected. As a result of the corrections it was determined that, at the time of the 1973 RIF, petitioner was qualified for electronics engineering positions on the GS-7 level . . . ".

TRUTH EXPOSED (2)

Respondent's Ct.Cl.Ex.#10, a July 1975 CSC-reinstatement order, awards a part-time GS-7 position. Respondent's Ct.Cl.Ex. #11 is the CSC duty statement rewrite of November 5th 1976. These exhibits certify that the 1975 CSC reinstatement decision came 1.4 years BEFORE the 1976 CSC position audit rewrite and so could not have influenced the 1975 CSC appeals opinion as claimed. Dr. Fried simply reversed events in time by 1.4 years to obstruct justice before the Supreme Court and make the sophistry believable.

UNTRUTH PLEADED (3)

Dr. Fried pleads in footnote (3) on page (3) of his response brief: " . . . Such a (GS-7) position was subsequently offered to and accepted by petitioner in 1975, with back pay and other benefits restored for the period dating from the 1973 RIF. BERGMAN, slip op. 28-29. Petitioner has persisted in his complaints, however, because the position he was offered and accepted in 1975 was not the one he wanted."

TRUTH EXPOSED (3)

According to Ct.Cl.Ex.#84, a 1981 Freedom of Information Act discovered document, DOC Policy Chief Joseph C. Brown planned to "offer" Petitioner a position scheduled for abolishment. Brown writes on 7/22/75: " . . . If ITS has to accomplish this (reinstatement) action, do so explaining to Bergman what is being done and telling him it's a "paper job"

which will immediately be abolished as no longer required with a new RIF being run however it runs." The "position" was faked. Petitioner was forced to sit at his assigned desk for 6 months, day after day, without a work assignment. All requests for work were ignored.

Petitioner became very sick and in 1977 Respondent hounded Petitioner into disability retirement.

UNTRUTH PLEADED (4)

On page 4, Dr. Fried pleads: " . . . But petitioner . . . has utterly failed to acknowledge his own dilatory conduct in raising his Privacy Act claims. When placed into proper context, it is clear that the court of appeals correctly decided the case."

TRUTH EXPOSED (4)

There was no "dilatory conduct" by Petitioner. 5 U.S.C. #552a provides no remedy for injuries prior to September 27th, 1975, but mandates four events before a plaintiff can file an action:

(1) Plaintiff must know of the wrong record. This was first certified on November 5th, 1976, through CSC audit to Petitioner.

(2) Plaintiff filed formal administrative appeals for correction to the CSC on 11/12/76, App. H, to President Carter and to the D.O.C. in 1977 and 1978, App. I, even though Petitioner had no knowledge of 5 U.S.C. #552a existence.

(3) 5 U.S.C. #552a mandates Respondent to inform Petitioner of his right to litigate in a U.S. district court. Respondent failed to inform Petitioner, App. H and App. I.

(4) Under 5 U.S.C. #552a, a Petitioner must be affected by an adverse action due to the false records before he can file. This requirement was perfected on June 16th, 1982, by the Court of Claims verdict that denied Petitioner 1973 RIF cancellation, based on Petitioner's false employment records.

UNTRUTH PLEADED (5)

Dr. Fried pleads on page 5 of his brief: " . . . Accordingly, since the adverse determinations in this case took

place years ago – in 1968 and 1973 – the statute of limitations had long expired before the present action was filed."

TRUTH EXPOSED (5)

Under 5 U.S.C. #552a, no injury before September 27th 1975 may be claimed. The 2 year statute, mandated by 5 U.S.C. #552a, cannot expire eight years before 5 U.S.C. #552a was created.

UNTRUTH PLEADED (6)

Page 6 of Dr. Fried's October 1985 brief states: "(The) records petitioner seeks to have corrected – position descriptions pertaining to petitioner's work while employed at the Department of Commerce – dated from 1962 to 1977.

TRUTH EXPOSED (6)

The statement is factually untrue. The corrections cited by Dr. Fried were made expertly by CSC audit on November 5th, 1976, but these new CSC position descriptions, duty statements, do not show classifications and competitive levels that describe the responsibility level or competitive level of the work, which were not established until the 1981 Ct.Cl. trial without objection of Respondent. Petitioner is entitled to have these undisputed true classification records attached to the pertinent CSC duty statements in his OPF and the untrue data expunged from his record. Without such attachment, the new true duty statements are worthless.

UNTRUTH PLEADED (7)

On page 6, Dr. Fried pleads: "Petitioner waited five years from the creation of the latest record in question to file his Privacy Act suit, and he did not invoke the Act's administrative procedures until after this action was pending.

TRUTH EXPOSED (7)

The latest record was created by CSC audit on November 5th, 1976, and Petitioner demanded assignment of proper

classifications and competitive levels in his administrative appeal of November 12th 1976, rejected December 17th 1976, App. H. This, and later appeals in 1977 and in 1978, satisfied 5 U.S.C. #552a appeal requirements although Petitioner did not know of the Privacy Act at the time and Respondent failed his mandated duty by not informing Petitioner of his right for judicial review under the act. Petitioner filed a *second formal request for correction* after he filed under 5 U.S.C. #552a in case COLO. D.Ct. #82-A-1665.

UNTRUTH PLEADED (8)

Dr. Fried, on page 6 cites *Nagel v. United States Dep't of Health*, 725 F.2d 1348 at 1441 and pleads: "That principle is not implicated here, however, because of petitioner's failure to invoke the Privacy Act's administrative procedures with the period specified for the bringing of suit."

TRUTH EXPOSED (8)

Petitioner asserted his demand administratively for the CSC to assign correct classifications to the newly written duty statements on November 12th 1976, just 7 days after the CSC published its report with new duty statements from 1962 to 1976 but the CSC refused to assign these competitive levels, App. H, see also App. I in response to Petitioner's administrative appeals.

UNTRUTH PLEADED (9)

Dr. Fried states in footnote (6) on page 6: "In any event, it is questionable whether petitioner has stated a claim cognizable under the Privacy Act, because the relief he seeks is the amendment of subjective personnel classifications, for which other relief was available . . . "

TRUTH EXPOSED (9)

Petitioner does not seek amendment of subjective personnel classifications. In COLO. D. Ct. #82-A-1665 he seeks the

incorporation of true classifications made at the 1981 Ct.Cl. trial and wants these undisputed 1981 classifications incorporated into his OPF. These CSC rewritten duty statements of November 5th, 1976, were never classified officially by anyone prior to the 1981 Court of Claims litigation.

There is no "administrative relief" under these circumstances. Petitioner was no longer employed by Respondent and Respondent has denied his written appeals. Dr. Fried misled the Supreme Court with false information under assumption of truth to get certiorari denied.

Respondent does not want case COLO. D.Ct. #82-A-1665 come to trial as there is no dispute and he would lose. Even Judge Arraj told the Tenth Circuit that Petitioner's claim was not frivolous and addressed a substantial question, App. C.

2 YEAR STATUTE OF LIMITATION WAS NEVER EXCEEDED.

1) Petitioner's record correction case was filed in 1982 under Privacy Act 5 U.S.C. #552a, which states specifically that no injuries that occurred prior to September 27th, 1975, may be sued for.

2) Respondent's claim, that a statute of limitation of a law not enacted before 1976 nor applicable to events before September 27th, 1975, can have expired based on events that occurred eight years before the Act's inception is not logical in fact or in law.

3) The CSC published re-write of Petitioner's official duty statements in November 5th, 1976, occurred after 5 U.S.C. #552a became law in 1976.

4) In response to numerous administrative appeals for classification and competitive level correction after the inception of 5 U.S.C. #552a in 1976, Respondent denied Petitioner and failed to inform him of his right to file a complaint in a U.S. District Court under 5 U.S.C. #552a(g)(1)(D).

5) 5 U.S.C. #552a demands that before the right file in a U.S. District Court exists, an adverse decision based on the erroneous records must have affected Petitioner. This did not occur until June 16th, 1982, with the Court of Claims reliance

on the false classifications and competitive levels that respondent submitted to the Court during the 1978 and 1982 litigation and caused the Court to dismiss Petitioner's RIF correction case.

6) Petitioner first met the 5 U.S.C. #552a requirements to file his complaint under the Privacy Act in June, 1982, and was not "out of time" to file COLO. D.Ct. #82-A-1665.

7) With true classifications and competitive levels established at trial in 1981 without a single objection by Respondent, all that remains is to incorporate these correct classifications and competitive levels with the appropriate 1976 re-written duty statement of the CSC that are now in Petitioner's OPF.

8) The Statute of Limitation had not expired when Petitioner filed case COLO. D.Ct. #82-A-1665.

THE ISSUE BEFORE THE TENTH CIRCUIT COURT OF APPEALS.

On January 16th, 1990, the 10th Circuit denied Petitioner's Fed.R.Civ.P. 60(b)(6) motion in 5 U.S.C. #552a case COLO. D.Ct. #82-A-1665. On February 28th, 1990, Petitioner's request for re-hearing was denied.

Petitioner's 60(b)(6) appeal in case COLO. D.Ct. #82-A-1665 to the District Court for Colorado was, that the court was misled by Respondent's bad faith pleadings that swayed Judge Alfred A. Arraj to rely in error on Respondent's win in Petitioner's Court of Claims RIF cancellation case, litigated under the TUCKER ACT.

Petitioner filed his 5 U.S.C. #552a record correction case COLO. D.Ct. #82-A-1665 in 1982. He also filed a 28 U.S.C. #2680 tort claim in 1983 under COLO. D.Ct. #83-A-188 in relation to Respondent's obstruction of justice before the Court of Claims using perjury, fraud, deceit, sophistry and false employment records to prevail.

First, Judge Alfred A. Arraj granted sovereign immunity to the Federal officers who litigated before the Court of Claims with perjury, fraud, deceit, and false records. He did so in tort case COLO. D.Ct. #83-A-188. Having so ruled,

Judge Arraj then dismissed Petitioner's 5 U.S.C. #552a record correction case COLO. D.Ct. #82-A-1665, using as his basis what he perceived from the Court of Claims litigation as presented to him by Respondent, the same Court of Claims litigation where Judge Arraj had just awarded sovereign immunity to Respondent for litigating, in the Judge's opinion, in intentional tort, App. D.

Judge Arraj granted Respondent summary judgment in case COLO. D.Ct. #82-A-1665 under 5 U.S.C. #552a, ruling that the Statute had tolled. Dismissing COLO. D.Ct. #82-A-1665 by relying on the same Court of Claims case where Judge Arraj has just granted sovereign immunity to Respondent for litigating before the Court of Claims with intentional tort, was fatal to Petitioner. Judge Arraj and the 10th Circuit was again misled by Respondent with pleadings in bad faith on this Petitioner's Fed.R.Civ.P. 60(b)(6) motion to have case COLO. D.Ct. #82-A-1665 to come to trial. This was made easy for Respondent as Petitioner's Privacy Act record correction case COLO. D.Ct. #82-A-1665 was somehow combined with Petitioner's negligence tort case COLO. D.Ct. #83-A-188 before the Tenth Circuit, an action fatal to Petitioner. We examine the January 16th 1990 order of the 10th Circuit Court of Appeals, App. A.

THE 10th CIRCUIT OPINION

Paragraph 1 on page 2 of its Jan. 16th 1990 order is in error. Petitioner's 60(b)(6) motion addressed Privacy Act case COLO. D.Ct. #82-A-1665 under 5 U.S.C. #552a, not tort case COLO. D.Ct. #83-A-188 under 28 U.S.C. #2680. The courts were misled by Respondent, who, in fact, made no response to Petitioner's 60(b)(6) motion on case COLO. D.Ct. #82-A-1665, but who addressed his response to tort case COLO. D.Ct. #83-A-188, which was not under appeal.

It is accepted practice in Court litigation that when a fact asserted by one party is not denied by the opposing party, this fact is accepted as true. Therefore Petitioner is in his legal right to demand that the 5 U.S.C. #552a record correction case COLO. D.Ct. #82-A-1665 be set for trial in the Court

below as Respondent has not opposed this issue in the Court below or in the 10th Circuit.

Instead, Respondent argued to the Courts under "assumption of truth" using pleadings appropriate to tort case COLO. D.Ct. #83-A-188 which Petitioner did not appeal. This proves that Respondent had no defense to argue against Petitioner's 60(b)(6) motion in case COLO. D.Ct. #82-A-1665. Without Respondent defending against the merits of Petitioner's Fed.R.Civ.P. 60(b)(6) motion, it must be granted by law.

THE 10TH CIRCUIT MISLED BY RESPONDENT.

In paragraph #2 of page 2 of the subject order, the Court asserts incorrectly that Petitioner filed in the Court of Claims for classification relief. Petitioner filed in the Court of Claims in 1978 under jurisdiction of the TUCKER ACT for cancellation of a 1973 illegal reduction in force. Through documents in evidence in the Court of Claims, Respondent admitted that Petitioner was misclassified App. K. Correct classifications and competitive levels were assigned unopposed in open trial in the Court of Claims in 1981. Petitioner is in his rights to request that this trial established undisputed classifications and competitive levels by incorporated in his OPF along with the pertinent 1976 CSC written duty statements. This, the Court of Claims denied in 1982.

Almost the entire order of the 10th Circuit addresses tort matters which were not before the Court in COLO. D.Ct. #82-A-1665. This is an abuse of discretion. Respondent, having no other defense, confused and obfuscated with false facts by intermixing the two cases COLO. D.Ct. #83-A-188 and COLO. D.Ct. #82-A-1665 indiscriminately to win before the Tenth Circuit and the Court below. So he argued case COLO. D.Ct. #83-A-188, which Petitioner had not appealed. It would not have been unreasonable to demand that someone could have read Petitioner's 60(b)(6) motion in the Court below or in the Tenth Circuit, before relying totally on Respondent's obfuscations.

This is proven and is clearly evident on page 2 of the Tenth Circuit order, which states " . . . Bergman had failed to allege a

state law tort of outrage. *Bergman v. United States* #82-A-1165 (D.Colo.1983)".

This statement is totally irrational, without foundation or relevancy because:

(1) There is no case COLO. D.Ct. #82-A-1165 applicable to Petitioner.

(2) A tort of outrage could have been part of tort case COLO. D.Ct. #83-A-188 but this case was not appealed by Petitioner. Even had it been appealed, how could Petitioner allege a state law tort of outrage when he only claimed negligence, App.D.

(3) If COLO. D.Ct. #82-A-1165 is just a misprint, perhaps COLO. D.Ct. #82-A-1665 was intended by Respondent. But case COLO. D.Ct. #82-A-1665 is the Privacy Act case for classification correction, 5 U.S.C. #552a, under appeal here. Again: An "outrageous tort claim" does not belong to a simple record correction case COLO. D.Ct. #82-A-1665. It could have applied to tort case COLO. D.Ct. #83-A-188, if Petitioner had alleged intentional tort, which he did not – he claimed only negligence, App.D. Nevertheless, the nine counts of bad faith litigation before the Supreme Court in 1985 by Dr. Charles Fried, cited herein, if intentional, can be construed as torts of outrage, but intentional tort was not charged by Petitioner. Perhaps the Supreme Court considers the Fried Torts intentional?

Page 3 of the Tenth Circuit order is again substantially in error and reflects further obfuscation by Respondent. No claims regarding personal individuals was brought under case COLO. D.Ct. #82-A-1665. Officers were listed in the heading of the case, as is proper. The personal claims were brought in the frame of negligence in tort case COLO. D.Ct. #83-A-188 which is not under appeal here. Case COLO. D.Ct. #87-F-1391 concerned a claim of non-intentional tort against Dr. Charles Fried before the Supreme Court of the United States addressed in this brief, which was dismissed.

Respondent's argument to the 10th Circuit Court of Appeals based on tort case COLO. D.Ct. #83-A-188 is entirely

irrelevant here. The entire argument of the 10th Circuit resulted from Respondent's misleading the courts with obfuscation by arguing tort case COLO. D.Ct. #83-A-188 while ignoring the Fed.R.Civ.P. 60(b)(6) motion for record correction case COLO. D.Ct. #82-A-1665. The only issue addressed by Petitioner here is 5 U.S.C. #552a, record correction case, but the merits of this issue were not addressed by either Respondent or the Tenth Circuit Court of Appeals. Therefore, the entire 10th Circuit order is without merit, has no substance, does not apply to the issue, is totally irrelevant and must be vacated.

Furthermore, Petitioner's motion for certiorari should be granted because the Tenth Circuit order proves that there is no dispute on Petitioner's Fed.R.Civ.P. 60(b)(6) motion in record correction case COLO. D.Ct. #82-A-1665 and the merits of that case must come to trial.

Since the requested classification and competitive level assignments under COLO. D.Ct. #82-A-1665 are in evidence and resulted from Court of Claims uncontested trial testimony, and since Petitioner agrees with these facts, there is no dispute on that point either. Since there is no dispute on any issue concerning Petitioner's Fed.R.Civ.P. 60(b)(6) motion to hold trial in 5 U.S.C. #552a, case COLO. D.Ct. #82-A-1665, there is nothing to prevent correction of Petitioner's records with the assignment of the 1981 trial-assigned classifications and competitive levels to the 1976 CSC rewritten duty statements and to have this date incorporated appropriately into Petitioner's OPF.

LEGAL ARGUMENT, VACATE JUDGEMENT UNDER Fed.R.Civ.P. 60(b)(6):

Rule 60(b)(6) was a proper tool for Petitioner to address the courts below and the Supreme court. He has satisfied all requirements under *Klapprott v. United States*, 335 U.S. 610 (1948) to warrant the requested writ of certiorari to the Tenth Circuit or the Court Below as the only way to achieve substantial justice.

Application of Fed.R.Civ.P. 60(b)(6) is warranted here much more than in other cases granted. For example: In *Boughner v. Secretary of H.E.W.* (CA3d,1978) 572 F.2d 976 plaintiff's attorney failed to oppose a motion of defendant because he was involved in a judicial campaign; lost his secretary and had a large backload of cases. According to the Court, the lawyer's conduct indicated neglect so gross as to be inexcusable and Fed.R.Civ.P. 60(b)(6) was invoked, see Volume 7 of Moore's Federal Practice, page 60-286, Section 60.27[2] on *ANY OTHER REASON*, 60(b)(6).

Comparing *Boughner* with *Bergman*, here Respondent's officers misled the courts below and the Supreme Court by litigating in bad faith. Equating "Mandated Relief" under 60(b)(6) in *Boughner*, with the extraordinary circumstances in *Bergman* should more than mandate relief under 60(b)(6) and warrant the certiorari relief sought by Petitioner.

Klapprott v. United States, 335 U.S. 601 at 609 (1948) states: "Amended rule 60(b) authorizes a court to set aside "a void judgement" without regard to the limitation of a year applicable to motions to set aside on some other grounds," and at 613: "it is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgement showed, at most, nothing but "excusable neglect". But petitioner may avail himself of the broad "any other reason" clause of 60(b) because petitioner shows factually most extraordinary circumstances which cannot constitute "neglect" on his part".

Petitioner's motion for certiorari shows not excusable neglect by Respondent but obstruction of justice under sovereign immunity including pleading nine counts of untruths to the Supreme Court of the United States.

Citing *Lepkowski v. United States Department of Treasury*, 804 F.2d 1310 (D.C.Cir. 1986) at 1311: " Post Judgement motions under rule which provides relief from judgment or order do not toll time for appeal of underlying judgement.

In *Laskey v. Continental Products Corp.*, 804 F.2d 250 (3rd Cir. 1986) references Moore's Federal Practice, Section 60.19, pages 60-164, 60-165. It states: " . . . the procedure provided by Rule 60(b)(6) is not a substitute for an appeal;

the rule should be liberally construed for the purpose of doing substantial justice." This refers to " . . . deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgements, and whether there is merit in the defense or claim, as the case may be; if relief is sought from a judgement rendered after trial on the merits, whether the movant had a fair opportunity to present his claim or defense; whether there are any intervening equities which make it inequitable to grant relief; and any other factor that is relevant to the justice of the judgement under attack; . . . " In *Bergman* only a writ of certiorari will achieve substantial judgement.

Citing "Moore", #60.27(2) p. 60-283: "Under the *Klapprott* doctrine special circumstances may exit that justify the Court in treating the failure to answer as under compulsion of circumstances rather than through neglect, thus bringing the motion within Rule 60(b)(6). So, too, when a litigant appears pro se, any negligence is likely to be personal, though conceivably it could be due to negligence of his agents. In such cases good reason may exist for relaxing to some extent the standard of alertness that might be supposed to apply to a member of the bar."

It is almost impossible for a pro-se citizen, like this litigant, to get a fair hearing when he is held to more than the strictest adherence to all rules of procedure while the Respondent may litigate freely using perjury, fraud, sophistry and deceit before the highest courts including the Supreme Court of the United States. This attacks the constitution and must be stopped as it is treasonous.

In *L.P. Steuart, Inc. v. Matthews* (CA DC, 1964) 329 F.2d 234, 8 FR Serv2d 60b.31, Case 1, cert. denied (1964) 379 U.S. 824, 85 S.Ct. 50, 13 L.Ed.2d 35, plaintiff's case was dismissed for failure to prosecute. Two years later, plaintiff filed a motion to vacate judgement for personal reasons. The District Court denied, but the Court of Appeals reversed, holding that under the circumstances the District Court abused its discretion in denying relief under Rule 60(b)(6). In *Bergman* we have the similar circumstances especially since

Judge Arraj of the District Court told the 10th Circuit that Petitioner's claim has merit and is not frivolous, Appendix C.

Citing *Schauss v. Metals Depository Corp.*, 757 F.2d 649 (1985) at 655: "in simple English, the language of the 'other reason' clause (sub-section (6)), for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgement whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1948).

The broad of clause (b) gives the court ample power to vacate judgement whenever such action is appropriate to accomplish justice. *L.M. Leathers' Sons v. Goldman*, 252 F.2d 188 (6th Cir. 1958); 3 Barron & Holtzoff, Federal Practice and Procedure § 1329 (Wright ed 1958) "[C]lause (6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." 7 *Moore, supra.* section 60.27[3], at 308. This court has recognized and implemented wide equitable force and effect for Rule 60(b)(6). *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir., 1963); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817 (5th Cir. 1965) Id. at 248.

DENIAL OF DUE PROCESS

The bad faith pleadings of Dr. Charles Fried before the Supreme Court are a denial of due process.

The United States Supreme Court has stated that perjured, contrived, or suppressed evidence favorable to a party is a violation of due process of law. *Mooney v. Holohan*, 294 U.S. 103 at 112, 55 S.Ct. 340 at 342, *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The issue is fair hearing and suppression of evidence violates fair hearing standards. *In re Ferguson*, 96 Cal. Rptr. 595, 487 P.2d 1234 (1971). Failure to disclose testimony favorable to the defendant (or the plaintiff in this case) was a violation of fair hearing standards. *People v. Rutherford*, 121 Cal. Rptr. 216, 534 P.2d 1341 (1975).

All of the following apply to *Bergman, supra*:

In *U.S. v. Bouziden*, 108 F.Supp. 395 (1952) the court noted that the purpose of a hearing is to enable a hearing officer (The CSC Appeals Authority and the Courts in this case) to form an intelligent opinion (108 F.Supp. at 398). Where this information is withheld from the party at risk which affects the decision, the hearing is a sham. *U.S. v. Bouziden, supra*, also *Gonzales v. U.S.*, 348 U.S. 407, 75 S.Ct. 409 (1955) and in *Crotty v. Kelley*, 443 F.2d 214 (5th Cir. 1971), *Rasmussen v. U.S.*, 543 F.2d 134, 139; 211 Ct.Cl.260 (1976).

Cases cited in precedent and *Klapprott, supra*, and the facts in *Bergman* shown above and respondent's admissions, pleadings of sovereign immunity, and the nine counts of misleading the Supreme Court, there is no doubt that Petitioner was never "out of time" when he filed his complaint under 5 U.S.C. #552a in 1982.

Ignoring all others, obstructing justice before the Supreme Court of the United States, as was done in S.Ct. case #85-44, counts (1) through (9) above, stands as a beacon of disrespect to the Supreme Court of the United States and all courts below. Surely the Supreme Court will not allow such illegal, unethical and outrageous practices by Respondent to be tolerated and to continue?

REASON FOR GRANTING THE WRIT.

The Tenth Circuit Court of Appeals was misled by Respondent to dismiss Petitioner's 60(b)(6) motion on Privacy Act case COLO. D.Ct. #82-A-1665 by addressing tort case COLO. D.Ct. #83-A-188 which was not before the Court. The issue under Petitioner's Fed.R.Civ.P. 60(b)(6) motion to hear his 5 U.S.C. #552a work record correction case COLO. D.Ct. #82-A-1665, was not addressed by the 10th Circuit although Judge Alfred A. Arraj informed the Court that Petitioner's arguments had merit and posed a substantial question, App. C.

Since Respondent did not object to Petitioner's motion to remand the 5 U.S.C. #552a record correction case for trial,

there is no dispute and case COLO. D.Ct. #82-A-1665 may now come to trial.

Examining the nine counts on how the Supreme Court was misled to deny certiorari (S.Ct. case #85-44) by U.S. Solicitor General Charles Fried, should by itself be sufficient to vacate the erroneous lower Court dismissals. Litigation in tort before the Supreme Court, even if non-intentional, cannot be a basis for supporting lower court ruling that were based on exposure to intentional tort, so ruled by Judge Arraj in tort case COLO. D.Ct. #83-A-188 – although Petitioner only charged negligence.

The statute had not tolled when Petitioner filed to correct classifications and competitive levels under 5 U.S.C. #552a in 1982. This law states that injuries inflicted before September 1975 cannot be addressed and so Respondent's claim that Petitioner's causes of action accrued in 1968, or for that matter in 1973, is not rational.

Petitioner satisfied administrative appeals requirement by demanding assignment of true classifications and competitive levels on November 12th, 1976, which Respondent denied on December 17th, 1976, without informing Petitioner of his right to file for review in a U.S. District Court.

The first adverse decision due to erroneous records after 5 U.S.C. #552a was enacted and duty statements were rewritten, occurred on June 16, 1982, when the Court of Claims supported Respondent by denying 1973 RIF cancellation based on the erroneous competitive levels in Petitioner's OPF. Only then had Petitioner jurisdiction to file case COLO. D.Ct. #82-A-1665.

Respondent's efforts to block incorporation of correct classifications and competitive levels into Petitioner's OPF must not prevail or justice in America is no longer a citizen's dream but an innocent victim's nightmare. Respondent's litigation in bad faith to obstruct justice before CSC appeals authorities and the courts under self-invoked sovereign immunity is a disgrace and an outrage. The nine counts to mislead the Supreme Court by Acting U.S. Solicitor General Dr. Charles Fried in 1985, certify to this.

Enforcement of Petitioner's Fed.R.Civ.P. 60(b)(6) motion through certiorari to the 10th Circuit, is amply warranted in this most extraordinary, unique and Constitution-defying case.

CONCLUSION

The Tenth Circuit ignored the substance of Petitioner's Fed.R.Civ.P. 60(b)(6) motion to vacate the erroneous dismissal of record correction case COLO. D.Ct. #82-A-1665 under 5 U.S.C. #552a and so this case can come to trial. There is no mention of Petitioner's Fed.R.Civ.P. 60(b)(6) appeal substance that Judge Arraj first granted Respondent sovereign immunity for litigating in the Court of Claims with intentional tort (case COLO. D.Ct. #83-A-188) and only after granting sovereign immunity then used that very same Court of Claims case as his basis to dismiss Petitioner's COLO. D.Ct. #82-A-1665 record correction case.

Instead of examining this issue, the Tenth Circuit addressed tort case COLO. D.Ct. #83-A-188 that was not appealed by Petitioner as proven on page 3 of its January 16, 1990, denial by stating: " . . . In this situation, where Bergman claims fraud, deceit and other government misconduct have been extensively reviewed by both the district courts and the Courts of Appeals, we find that the district court did not abuse its discretion in refusing to reopen under Rule (60)(b)."

BUT THIS WAS NOT THE SUBJECT OF PETITIONER'S 60(b)(6) MOTION!

The Tenth Circuit just repeated Respondent's pleadings just as the Court below had done, and addressed tort case COLO. D.Ct. #83-A-188 under 28 U.S.C. #2680, which was not the subject of Petitioner's 60(b)(6) motion.

Without Respondent's opposition to Petitioner's Fed.R.Civ.P. 60(b)(6) motion in case COLO. D.Ct. #82-A-1665 under 5 U.S.C. #552a and without the Courts opposing the Fed.R.Civ.P. 60(b)(6) motion to vacate the initial dismissal of COLO. D.Ct. #82-A-1665 and since there is no dispute what the record corrections should be as proven by

the uncontested classification and competitive level assignments in the 1981 Court of Claims trial, the Supreme Court has no dispute to resolve by granting certiorari and order case COLO. D.Ct. #82-A-1665 to come to trial or order Petitioner's work record corrected in accordance with the unopposed 1981 trial-assigned classifications and competitive levels in the Court of Claims.

How Petitioner could be out of time in 1982 to request this correction to the District Court under 5 U.S.C. #552a in COLO. D.Ct. #82-A-1665, a correction which was trial-established and not disputed by Respondent in the 1981 Court of Claims trial, is incomprehensible to Petitioner.

With Petitioner standing in fear before the greatest Court in the United States and meaning absolutely no disrespect but holding to his Constitutional right to present grievances, he asks: "Could the Supreme Court hold for Respondent again, knowing now that this very Supreme Court was the victim of nine counts of obstruction of justice by Respondent in *Bergman v. United States*, S.Ct. case #85-44 as alleged by Petitioner herein, allegations supported by prima facie hard proofs?"

PRAYER FOR RELIEF

Petitioner prays that the Supreme Court will hear him and grant his motion for certiorari to the Tenth Circuit Court of Appeals relative to his Fed.R.Civ.P. 60(b)(6) motion to have the dismissal of record correction case COLO. D.Ct. #82-A-1665 vacated and have that case come to trial in the U.S. District Court.

In the alternative, Petitioner prays that the Supreme Court will simply order Petitioner's Official Personnel Folder corrected to reflect the true and undisputed classifications and competitive levels that belong to his corrected official duty statements prepared through CSC audit and now residing in his Official Personnel Folder, and permit Petitioner to address the subject of damages provided for under 5 U.S.C. #552a(g)(1).

In this most extraordinary case, Petitioner prays that this Honorable Court will request Respondent to answer this brief and not let him escape responsibility for his misdeeds as he did once before in *Bergman v. United States*, S.Ct. Case #88-1519, on March 31st 1989.

Respectfully submitted,

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750 30th Street
Boulder, Colorado
80303
Tel: 303-449-7776

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RALPH ROGER BERGMAN,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF COMMERCE; HONORABLE MALCOMB BALDRIDGE; SECRETARY OF COMMERCE; JOSEPH C. BROWN, Personnel Officer; EDGAR A. HUBIN, Personnel Officer, Department of Commerce; UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, Denver Region; ROBERT J. DUNN, Director; GEORGE F. DWYER, Director; JOSEPH STECK, Deputy Director; JOHN THORLAND, Classification Officer,

Defendants-Appellees.

No. 89-1173
(D.C. No. 82-A-1665)
(D. Colo.)

FILED
JAN 16 1990

ORDER AND JUDGMENT*

Before SEYMOUR, TACHA, and EBEL, Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted, without oral argument.

Ralph Roger Bergman appeals the order of the district court denying his Fed. R. Civ. P. 60(b)(6) motion to correct judgment. Bergman contends that the court erred in failing to consider his attorney's admonishment by the Colorado Supreme Court and the many allegations of fraud, deceit, and other inappropriate conduct on the part of the government attorneys representing the government defendants. We affirm.

Bergman initially filed an action before the court of claims seeking reclassification relief. The court of claims did not reach the merits, finding that it was without jurisdiction over reclassification requests. *Bergman v. United States*, No. 84-78 (Ct. Cl. 1982). The Federal Circuit affirmed. *Bergman v. United States*, 706 F.2d 319 (Fed. Cir. 1983). Bergman then filed for relief in district court, alleging violations of the Privacy Act, 5 U.S.C. § 552(a) & (g), misrepresentation, deceit, and slander (as interpreted by the district court), breach of statutory duty under the Privacy Act, and intentional infliction of emotional distress. The district court determined that Bergman's Privacy Act claims were barred by the statute of limitations, that the tort claims were barred by the immunity retained by 28 U.S.C. § 2680(h), that there is no private right of action available under the Privacy Act, and that Bergman had failed to allege a state law tort of outrage. *Bergman v. United States*, No. 82-A-1165 (D. Colo. 1983). We affirmed, *Bergman v. United States*, 751 F.2d 314 (10th Cir. 1984), and

the Supreme Court denied certiorari, 474 U.S. 945 (1985). Bergman then brought the same claims against the individuals in their personal capacities. This action was dismissed, *Bergman v. United States*, No. 87-F-1391 (D. Colo. 1987), and we affirmed the dismissal in *Bergman v. United States*, No. 88-1761 (10th Cir. 1989), Bergman now seeks to reopen the district court judgment in the 1983 case.

We have extensively reviewed Bergman's contentions. We are unable to agree that the negligence, if any, of Bergman's attorney in his earlier representation rises to a level justifying Rule 60 relief. We note that mere negligence on the part of one's attorney does "not constitute a sufficient showing to warrant the extraordinary relief sought [by a Rule 60(b) motion]." *Blinder, Robinson & Co. v. SEC*, 748 F.2d 1415, 1420 (10th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985). In this situation, where Bergman's claims of fraud, deceit, and other government misconduct have been extensively reviewed and rejected by both the district courts and the Court of Appeals, we find that the district court did not abuse its discretion in refusing to reopen under Rule 60(b).

Finally, we note that Bergman is not cut off from all possibilities of redress from the government. He may still contact legislative or executive representatives in an effort to seek relief. These channels may still be open; it is his Privacy Act and tort challenges which are barred by the statute of limitations, *see Bergman v. United States*, 751 F.2d 314 (10th Cir. 1984), *cert. denied*, 474 U.S. 945 (1985).

The order of the district court is AFFIRMED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RALPH ROGER BERGMAN, Plaintiff - Appellant, v. UNITED STATES DEPARTMENT OF COMMERCE; et al., Defendants - Appellees.	)	89-1173

ORDER

Filed February 28, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, DRORBY and EBEL, Circuit Judges.

This matter comes on for considerations of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member

of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-A-1665

RALPH ROGER BERGMAN

Plaintiff

vs

UNITED STATES DEPARTMENT
OF COMMERCE, et al

Defendant

ORDER GRANTING LEAVE TO FILE
NOTICE OF APPEAL IN FORMA PAUPERIS

FILED JUN 6 1989

This matter coming to the attention of the Court on the Motion and Affidavit in Forma Pauperis for Leave to File Appeal without prepayment of fees, and the Court having examined said Motion and Affidavit finds that this appeal is not frivolous and presents a substantial question. It is, therefore,

ORDERED as follows:

1. That the *Plaintiff* be permitted to file the Notice of Appeal without the prepayment of fees and costs, as provided by Section 1915, Title 28 U.S.C.

2. That the Clerk prepare the record on appeal consisting of only such pleadings, orders and documents as may be necessary for the record on appeal.

3. That the court reporter shall promptly prepare for inclusion in the record on appeal an original and one copy of the reporter's transcript of record of the evidence without the prepayment of the fees therefor, provided that the payment of the expense thereof shall be authorized and paid by the Administrative Office of the United States Courts.

Denver Colorado, this 6th day of June, 1989.

BY THE COURT:

/s/ Alfred A. Arraj
JUDGE

APPENDIX D

No. 83-2429

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RALPH ROGER BERGMAN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR DEFENDANTS-APPELLEES

Respectfully submitted,

ROBERT N. MILLER
United States Attorney

* * *

II. THE COURT DID NOT ERR WHEN HE DISMISSED PLAINTIFF-APPELLANT'S CAUSE OF ACTION BASED ON NEGLIGENCE

" . . . Judge Arraj held that plaintiff-appellant's claim was barred by the immunity retained under 28 U.S.C. § 2680(h) and supported his position by citing *Wine v. United States*, 705 F.2d 366 (10th Cir. 1983). The basis for his holding, of course, is the fact that the acts which

plaintiff-appellant has labeled as negligent are more appropriately described as intentional in nature. Specifically, the alleged suppression of information favorable to Bergman's appeal of his termination would amount to misrepresentation, deceit, libel or slander. The same would be true of perjury or an attorney's misrepresentation of the law to the Court. The alleged advice given to the Assistant Secretary of Commerce that she should deny Bergman's relief to which he was entitled, if actionable at all, would constitute interference with contract rights.

It is of course, axiomatic, that a plaintiff may not circumvent the immunity fro (sic) suit for intentional torts which is retained by § 2680(h) by merely couching his complaint in terms of negligence. Accordingly, the Court did not err when he dismissed that portion of Bergman's complaint which was based on negligence. . . . "

APPENDIX E

Ct CL. EX #145

SEAL

U.S. DEPARTMENT OF COMMERCE
Office of Telecommunications
INSTITUTE FOR TELECOMMUNICATION SCIENCES
Boulder, Colorado 80302

Date: MAY 24 1974

To: Record

From: E. A. Hubin /s/ E. A. Hubin
Management-Employee Relations

Subject: Official Personnel Folder: Ralph R. Bergman

Reference Grievance Decision by Director, Institute for Telecommunication Sciences, dated March 11, 1974 (attached).

In accordance with paragraph 1.B. of the Grievance Decision, the attached 4 pages of comment by Mr. Bergman were received from Mr. Bergman on May 22, 1974, for inclusion in his Official Personnel Folder. These comments reflect Mr. Bergman's views as to the nature and scope of duties he performed with this agency during the period November 3, 1968, through August 31, 1973.

Mr. Bergman's comments have not been reviewed by agency management as to whether the agency concurs with the accuracy or completeness of these statements. They are received under the Grievance decision solely as an expression of Mr. Bergman's viewpoint. Further,

the engineering classification reflected on the statements is also an expression of Mr. Bergman's viewpoint, and does not reflect a determination of the Agency under the Classification Act.

Attachment

cc: Ralph R. Bergman
Director, ITS

APPENDIX F

CT. CL. Ex #306

From Ralph Roger Bergman
Physicist GS 7 temporary
Part time
NOAA SDL

July 15 1975

TO Mr John Doughty
APO, NOAA Boulder

Dear Mr Doughty:

This is a classification appeal for you to reclassify my position as Electronic Engineer GS 7. You will find the agency opposed to such a move because of continuing discrimination practices against me. The submitted conspiricy (sic) testimony speaks for itself.

Sincerely yours

/s/ Ralph R. Bergman

I am in receipt of the above Classification appeal as requested in sentence 1.

/s/ John W. Doughty
Area Personnel Officer
7-15-75

APPENDIX G

UNITED STATES CIVIL SERVICE COMMISSION

DENVER REGION

OFFICE OF THE DIRECTOR, DENVER, COLO. 80225
NOV 05 1976

Mr. Douglas D. Crombie, Director
Institute for Telecommunication Sciences
Radio Building, Room 3020
325 South Broadway
Boulder, Colorado 80302

Dear Mr. Crombie:

We have enclosed two copies of the report of our special inquiry into the employment history of Mr. Ralph R. Bergman at the Department of Commerce conducted June 21, 1976, through July 7, 1976. The report contains a reasonably accurate description of duties, responsibilities and assignments performed by Mr. Bergman during his employment with the Department of Commerce since 1962.

The purpose of this inquiry was to obtain information regarding the exact nature of the work performed by Mr. Bergman with the Department of Commerce in Boulder. We conducted this inquiry in response to allegations made by Mr. Bergman that raised substantive questions concerning the veracity of information contained in his official work record . . .

. . . Notwithstanding, the failure on the part of ITS to properly describe the major duties and responsibilities of Mr. Bergman in sufficient specificity to comply with CSC

required standards of adequacy, our more general concern is that the position classification process is deficient in ITS and serious classification problems may be widespread – specifically regarding (1) promptness in classifying and reclassifying positions on a timely basis and (2) assuring the adequacy and currency of position descriptions. Our review of Personnel Management at ITS conducted in December 1974 clearly indicated that serious problems existed in position classification, notably:

° failure of the classification system to keep pace with changing assignments – i.e., assignment changes that took place, but were not identified by the personnel system;

° individual qualifications are used as a significant part of the classification of research positions and rightly so; however, a tendency exists toward over-emphasis on person-based rather than job-based decision making;

° inaccurate and incomplete position descriptions; and

° disregard for proper classification of accuracy of position descriptions until a reduction in force requires a major "drive" to update position descriptions . . . "

APPENDIX H

SEAL

UNITED STATES CIVIL SERVICE COMMISSION

DENVER REGION

COMPRISING COLORADO, MONTANA, N. DAKOTA, S. DAKOTA, UTAH, WYOMING

OFFICE OF THE DIRECTOR, DENVER, COLO. 80225
DEC 17 1976

ADDRESS:
DIRECTOR, DENVER REGION
U.S. CIVIL SERVICE COMMISSION
BUILDING 20, DENVER FEDERAL CENTER
DENVER, COLO. 80225

IN REPLY PLEASE REFER TO

DE:PES:INF 5

YOUR REFERENCE

Mr. Ralph R. Bergman
U.S. Department of Commerce
Office of Telecommunications
Institute for Telecommunications
Boulder, Colorado 80302

Dear Mr. Bergman:

This is in reply to your recent letter of November 12, 1976, in which you again request that we assign title, serious and grade to specific positions encumbered by you during the past 14 years as an employee of the Department of Commerce – particularly the positions encumbered by you immediately prior to the 1968 and 1973 reduction-in-force at Department of Commerce, Boulder, Colorado.

In our letter to you, dated November 5, 1976, we cited verbatim the extent and limitation of the Civil Service Commission's authorities with regard to classification appeals. Clearly, these regulations or authorities do not provide for retroactively classifying a position not presently encumbered by the employee when an employee desires a change in series or grade. Again, we must reiterate that we cannot assign title, series and grade to your past positions – which are not nonexistent.

In you letter, you cite several efforts made by yourself or your representative to agency and Commission officials challenging the veracity of your past position descriptions. Although these were legitimate efforts on your part to correct perceived deficiencies in past position descriptions, these activities did not constitute an official appeal of the serious and grades of specific positions previously encumbered by you.

With regard to your claim that you were not cognizant of your right of appeal of the classification of your position, the Commission strongly recommends that each agency establish and publish procedures for the processing of and deciding on position classification appeals. Although not a requirement, these procedures should be made known, in writing, to all employees. We cannot now accept an appeal of series and grade on your past positions (prohibited by regulation) simply because you may not have known of this appeal procedure.

In response to your request that we review our files and locate "a classification appeal filed by Attorney Stimmel and Koeberly (sic) in 1974 on my behalf citing all the wrong position descriptions over the years . . . ," we have

reviewed the aforementioned letter, dated December 16, 1974, and find that the letter did not represent an appeal of the series and grade of a position encumbered by you. The letter requested that we render corrective action with regard to the accuracy of your position descriptions and experience record in your official personnel folder. Our response of January 30, 1975, clearly addressed these issues – not the series and grades of positions previously encumbered by you in the Department of Commerce.

Lastly, in your letter you graciously advised me that you do not want to have out office "spend a single unnecessary cent on the Bergman case." We appreciate your concern regarding our time and resource constraints. However, our records indicate that we have advised you on a number of occasions (as far back as July 22, 1975) that we cannot retroactively assign, title, series and grades to past positions encumbered by you at Department of Commerce. We believe any further correspondence in this regard would not serve any useful purpose. Although we cannot assign, title, series and grades to your past positions, we sincerely believe that our recently issued report, which will be included in your official work record, will document assignments given to you and qualifications acquired by you which will be of great value to you in competing for future positions both with the Department of Commerce and elsewhere.

Sincerely yours,

/s/ George F. Dwyer
George F. Dwyer
Director

APPENDIX I

On October 25, 1977, the Assistant Secretary of Commerce for Administration, Ms. Elsa Porter, wrote to Petitioner a letter stating in part as follows:

> I have reviewed the report of the Office of Audits concerning the reduction-in-force actions affecting your past employment with the Department. I understand that you have a copy of the report.
>
> I have been advised by legal counsel that the Department has no authority to grant monetary relief to employees in circumstances like yours. Agencies cannot retroactively classify positions and cannot pay the legal or other expenses of employees arising out of their personal efforts to obtain redress for grievances.
>
> Insofar as it can reasonably be done at this time, I have had the 1973 reduction-in-force reconstructed. It appears clear from this that the you would have been similarly affected by the 1973 RIF if you had been classified as an Engineer at the time. You may find the enclosed copies of records useful in understanding this.
>
> As you known, the November 1976 report of the Denver Region Civil Service Commission office was placed in your official personnel folder file, to show for all future record purposes what work you did and what professional skills you employed. I see no need to take any further action concerning this aspect of your employment.

Petitioners Comment:

No Mention is made of 5 U.S.C. #552a

APPENDIX J

COURT OF CLAIMS
PLAINTIFFS SEAL
EXHIBIT
305
Case

Discovered April 1981
FOIA. (Freedom of Information Act)

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Administration
Washington, D.C. 20230

February 27, 1978

MEMORANDUM FOR Elsa A. Porter
Assistant Secretary for
Administration

/s/ Joseph C. Brown
From: Joseph C. Brown
Deputy Director of Personnel

Subject: Ralph R. Bergman

There is no authority to "settle" an amount of money on Mr. Bergman for past injustices.

The only authority I can find that will result in his receiving monetary relief, as you request, is the Back Pay Act (5 U.S.C. 5596). The Office of the General Counsel agrees with this conclusion.

Under that Act, the Department can award back pay on the basis of a finding by an appropriate authority that an employee had undergone an unjustified or unwarranted personnel action that resulted in a reduction of pay. . . .

. . . Cancellation of the RIF action as recommended above poses several difficulties which you should consider.

1. If you say the RIF was unjustified, Mr. Bergman may ask "how" or "why". Any logical reason you give

(e.g., he was in the wrong competitive level; he was on an erroneous job sheet; his qualifications were erroneously determined) opens a broad avenue for further claims by not only Bergman but also others who were adversely affected in the same RIF. In other words, you cannot answer that particular question.

2. As soon as Mr. Bergman receives your decision he will inform many of his friends similarly adversely affected and you may receive other requests to have 1973 RIF actions reopened. We will have to be prepared to deal with them by distinguishing them from Bergman's situation.

3. Bergman will not now discontinue his quest for "justice" from the Department of Commerce. I suggest we try to get him into a posture which would discourage him from further claims, by sending him a letter explaining what you plan to do and what effect it will have and then ask him orally to write you a letter saying that that relief will "square accounts" between him and the Department. Attached is a draft proposed letter.

4. There is a possibility that GAO may say your determination is not adequate under the law and regulations. While remote, the possibility should not be ignored. (Hence, the recommendation that the Certifying Officer submit the case to GAO in advance.) Bergman should understand that any payment made to him is subject to GAO allowance or disallowance.

5. You will have to write to the Director of the Office of Telecommunications, conveying your decision and instructing him to have the servicing personnel office and payroll office take the necessary steps to implement your decision. Your decision will not be greeted warmly. It may be resisted on sound legal grounds.

Attachments.

APPENDIX K

DISCOVERED APRIL 1981, Freedom of Information Act.

Ct.Cl.Ex. #300.

Employed by various bureaus of Department of Commerce at Boulder, Colorado, October 1962 – March 1977, with two intervening separations by RIF (in 1968 and 1973). Retired on disability pension March 16, 1977.

Appointed GS-5 Physicist (from private industry) 1962. RIF (position abolished) Feb. 1968 as GS-11 Physicist. Appealed to CSC Region; agency action sustained. Appeal to BAR; rejected as untimely filed. Re-hired November 1968 as Physicist, GS-11. RIF (position abolished) notice issued April 1973, with offer of temporary position. *Agency* pre-audit disclosed RIF not *bona fide*; cancelled July 31, 1973. New RIF notice issued August 1; separated Aug. 31, 1973. Appealed to FEAA; agency sustained January 1974. Appealed to ARB; ARB rescinded and remanded on grounds other positions should have been offered in lieu of separation.

In January 1975 FEAA ordered Agency to offer a GS-7 Electronic Engineer part-time position. Agency appealled [sic] to ARB on technical regulatory grounds; ARB denied.

August 1975 Bergman accepted Agency offer of position and was retroactively restored to GS-7 Electronic Engineer part-time position.

Current contentions, not new, but now supported by evidence Bergman did not have before:

1. Previously-held positions mis-classified: clearer evidence now available tends to support this long-held

contention. Agency generally concedes but cannot now rectify or "make whole."

2. Certain agency officials misled FEAA and/or ARB by making submissions in the 1973 RIF appeal which suppressed information favorable to Bergman's appeal (i.e., information about his actual work assignments tending to show his position was misclassified and his qualifications were stronger in professional engineering than his official employment record shows).

Bergman wishes opportunity to present this newly-found evidence to Commissioners, to reopen the decision on the 1973 RIF. ARB declines to re-open.

PLAINTIFFS COURT OF CLAIMS EXHIBIT
#300

To EAP (Elsa A. Porter) at her request 1/18/78 J.B. (Joseph Brown)